No. 17-9572

IN THE

SUPREME COURT OF THE UNITED STATES

CURTIS GIOVANNI FLOWERS,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Mississippi

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED
(restated)

Whether the Mississippi Supreme Court committed reversible error in considering a prosecutor's history of adjudicated purposeful discrimination in assessing the credibility of his proffered race-neutral reasons for peremptory strikes against prospective minority jurors under the totality of the circumstances.

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STATE OF MISSISSIPPI,
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On Petition for a Writ of Certiorari to the
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BRIEF IN OPPOSITION

This matter is before the Court on the Petition of Curtis Giovanni Flowers for a Writ of Certiorari to the Supreme Court of the State of Mississippi. The respondent, the State of Mississippi, prays this Court will deny his Petition.

OPINION BELOW

The Mississippi Supreme Court affirmed Flowers's four capital murder convictions and sentence of death by lethal injection on November 2, 2017, and denied his Motion for Rehearing on February 22, 2018. The decision became final on March 1, 2018, when the Mandate issued. The Opinion below is reported at 240 So.3d 1082, and appears in the Appendix attached to the Petition.[1]

[1] To avoid confusion, Respondent will follow Petitioner's lead and use the reference "*Flowers VI(B)* when referring to the decision below.

JURISDICTION

Petitioner seeks to invoke the Court's certiorari jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This matter involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

As he points out in his Petition, Petitioner, Curtis Flowers, has been tried six times in connection with the 1996 execution-style murders of Bertha Tardy, Robert Golden, Derrick Stewart, and Carmen Rigby. The murders took place on July 16, 1996, inside Tardy Furniture, a retail furniture store that was located in downtown Winona, which is located in rural Montgomery County, Mississippi. Petitioner was initially charged with one count of capital murder while engaged in the commission of armed robbery in four separate indictments. The State moved to consolidate the cases, but withdrew its motion. Petitioner subsequently moved to consolidate the cases, but the Circuit Court of Montgomery County denied his motion.

Flowers I

Petitioner was first tried for the capital murder of Bertha Tardy in Lee County, Mississippi, after a change of venue was granted. *Flowers v. State*, 773 So.2d 309, 312 (¶¶ 2-3) (Miss. 2000) (*Flowers I*). Petitioner's first trial began on October 13, 1997, and ended with the Lee County jury finding him guilty and recommending a sentence of death. *Id.* at 312, 313 (¶¶ 3, 6). He directly appealed to the Mississippi Supreme Court with twenty claims of error. *Id.* at 316-17 (¶ 19).

On direct review, the Mississippi Supreme Court found "the State improperly employed a tactic or trial strategy of trying [Petitioner] for all four murders during this trial for the murder of

[Bertha] Tardy alone.... Evidence of the other crimes was admitted which was not necessary in order for the State to prove its case in chief against [Petitioner] for the murder of Ms. Tardy." *Id.* at 317 (¶ 20). It also found "that the prosecutor repeatedly asked improper questions not in good faith in which there was no basis, in fact." *Id.* at 317 (¶ 21). The Mississippi Supreme Court held Petitioner "did not receive a fair trial," and reversed and remanded the case to the Circuit Court of Montgomery County for a new trial. *Id.* at 317 (¶¶ 20, 21). In doing so, the Court "also note[d] an accumulation of errors which warrant[ed] reversal[,] but found it "unnecessary to discuss the other assignments of error...." *Id.* at 317 (¶ 21).

Flowers II

Petitioner was then tried for the capital murder of Derrick "BoBo" Stewart. Petitioner's second trial was tried to a Harrison County jury on March 22, 1999, after a change of venue was granted and the case transferred to the Circuit Court of the First Judicial District of Harrison County. *Flowers v. State*, 842 So.2d 531, 535 (¶¶ 2, 3) (Miss. 2003) (*Flowers II*). Importantly, Petitioner's second trial began without the benefit of the *Flowers I* decision, which was handed down on December 21, 2000. *Id.* at 535 (¶ 2). Petitioner's second trial ended with the Harrison County jury finding him guilty of capital murder and recommending a sentence of death. *Id.* at 535 (¶ 3). He directly appealed to the Mississippi Supreme Court with ten claims of error. *Id.* at 537-38 (¶ 17).

As in *Flowers I*, the Mississippi Supreme Court found "the State employed a tactic or trial strategy of trying [Petitioner] for all four murders during this trial for which he was indicted only for the murder of Derrick Stewart. Evidence of other victims was admitted through photographs, diagrams and other testimony, which was neither relevant nor necessary to prove the State's case-in-chief against [Petitioner] for the murder of Stewart." *Id.* at 538 (¶ 18). The state court further found

"that the prosecutor repeatedly argued facts not in evidence ... during cross-examination of several witnesses and during the closing arguments of both the district attorney and the assistant district attorney." *Id.* at 538 (¶ 19). Additionally, the state appellate court found hearsay had been improperly admitted into evidence through the testimony of an expert witness for the State. *Id.* The court also noted, as it did in *Flowers I*, that an accumulation of errors warranted reversal without further discussion. *Id.* The court held Petitioner "did not receive a fair trial," and reversed and remanded Petitioner's second case for a new trial. *Id.* at 538 (¶ 18).

Flowers III

Petitioner's third trial began on February 2, 2004, in Montgomery County, after the decisions in *Flowers I* and *Flowers II* had been published. *Flowers v. State*, 947 So.2d 910, 916 (¶ 5) (Miss. 2007) (*Flowers III*). In light of those decisions, the four cases against Petitioner were consolidated and tried as one in Montgomery County. *Id.* A jury was empaneled from a pool of 600 potential jurors. *Id.* at 916 (¶ 6). As the Mississippi Supreme Court would later note:

> An initial jury pool consisting of 500 citizens was drawn, with 300 scheduled to appear on the first day of trial, a Monday, and the remaining 200 instructed to report to the courthouse on Wednesday. When the judge realized he may not have enough qualified jurors to empanel a jury from the initial venire, he entered an order for the clerk to draw the names of 100 more potential jurors. The voir dire process consisted of both group and individual examination. When the parties began exercising their peremptory strikes, the State exercised its first seven on African–American jurors. At this point, defense counsel lodged a *Batson* challenge, contending that the strikes were racially motivated. The judge declared that Flowers had shown a prima facie case of discrimination under *Batson* and required the State to proffer race-neutral reasons for the exercise of peremptory strikes, which Flowers then rebutted. The State also exercised its remaining five peremptory challenges of potential jurors on African–Americans. After the State had exercised all of its peremptory challenges, two African–American jurors were seated; however, one of those two was later excused after he informed the judge that he could not be a fair and impartial juror. The State then exercised all three of its strikes of alternate jurors on African–Americans. At the end of the jury selection process, the trial court ruled that the State had not exercised its peremptory challenges in a racially discriminatory

manner and denied Flowers' *Batson* challenge.

Id. (footnote omitted). Petitioner's third trial ended with the Montgomery County jury finding him guilty on all four counts capital murder and recommending the death penalty be imposed. *Id.* at 916 (¶ 7). He directly appealed to the Mississippi Supreme Court with eighteen claims of error. *Id.*

Petitioner's first claim of error on direct review was that the State's use of all twelve peremptory strikes against African-American prospective jurors and all three peremptory strikes against African -American prospective alternate jurors violated *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id.* at 916-17 (¶ 7). Four Mississippi Supreme Court Justices agreed after finding "the State engaged in racially discriminatory practices during the jury selection process and that the trial court committed reversible error in upholding the peremptory strikes exercised against Vickie Curry and Connie Pittman." *Id.* at 939 (¶ 73).[2] The plurality reversed and remanded for a new trial without reaching the remaining claims. *Id.*

But four dissenting Justices disagreed without the plurality. The dissent found no *Batson* violation, and would have affirmed the decisions to uphold the peremptory challenges of prospective jurors Curry and Pittman. *Id.* at 942-43 (¶¶ 89-94) (Smith, C.J., dissenting). It also took issue with the plurality's concerns with the peremptory strike against prospective juror, Sharon Golden—a peremptory strike the plurality concluded was in accordance with *Batson*. *Id.* at 941-42 (¶¶ 85-88).

Flowers IV

Prior to trial in *Flowers IV*, the State announced that it would not seek death due, in part, to

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[2] Justice Graves authored the plurality opinion in *Flowers III*, and was joined by Justices Waller, Diaz, and Dickinson. Justice Cobb concurred in result only with a separate written opinion, joined in part by Justice Dickinson. Chief Justice Smith dissented with separate written opinion, and was joined by Justices Easley, Carlson, and Randolph.

the defense presenting a last-minute defense witness. Jury selection in *Flowers IV* commenced on November 26, 2007. No *Batson* objection was lodged at trial. *Flowers IV* ended in a mistrial.

Flowers V

Jury selection in *Flowers V* commenced on September 22, 2008. The venire was comprised of 600 prospective jurors. After juror qualification, the venire consisted of ninety-six white individuals and seventy-one African-American individuals. Ten African-Americans were excused for views on the death penalty; more than twenty knew or were related to Petitioner or members of his family; three more could not objectively consider the evidence. The trial court made two on-the-record observations. It recognized that juror qualification and voir dire dramatically changed the composition of the venire as more than two-and-a-half times as many people were excused because they knew Petitioner or had some knowledge of the case. The trial court also observed the defense knew that there was a possibility that there would be a number of black citizens that would be excused because of knowledge of the case or Petitioner. Petitioner moved for a change of venue in *Flowers I* and *Flowers II* but not in *Flowers III*, *Flowers IV*, *Flowers V* or *Flowers VI*.

On September 24, a jury and three alternates were empaneled. Mary Annette Purnell, an African-American and prospective Juror 70, was seated as Alternate Juror 3. Shortly after, a conference took place in judge's chambers. There, the trial court and the parties learned that Ms. Purnell knew Petitioner, and had recently met with Petitioner at the Carroll County Jail as well as other members his family at Petitioner's parents' home. (Supplemental R. at S9-S13). The trial court, in turn, questioned Ms. Purnell in open court as follows:

> THE COURT: I have had it called to the Court's attention that you are on the visitation list at the county jail to visit [Petitioner]; is that correct?

[MS.] PURNELL: Yes, it is.

THE COURT: And you stated under oath yesterday that you did not know [Petitioner], that you had never — didn't know his family, didn't know anybody involved; is that correct?

[MS.] PURNELL: Yes, sir, it is.

THE COURT: And we've got a log from the jail where I think 60-something calls, I don't know, but a number of phone calls from the county jail to your house at your telephone number. Can you explain how that happened?

[MS.] PURNELL: I received calls from [Petitioner] and my nephew,

....

THE COURT: Well, Miss. Purnell, I do find that you perjured yourself under oath during the questioning process. I am going to strike you off this panel at this time, but I am also going to order that you be bound over to the grand jury to await action to decide whether you should be indicted for the crime of perjury.

I take perjury very seriously, and you – it seems crystal clear to this Court that you have, in fact, perjured yourself. And so I am going to order that you be jailed on a perjury charge.

I am going to set bond at $20,000. But you are to be held in the county jail until you post bond and until the grand jury can decide whether to indict your for perjury.

(Id. at S13, S14-S15).

A second conference took place in judge's chambers the following day on Thursday, September 25, 2008. During this conference, counsel for Petitioner confirmed the fact that Petitioner knew Ms. Purnell. Counsel also produced a written note that Petitioner had written and passed to him during voir dire on Tuesday, September 23, (Id. at S15-S17). The note, which concerned Purnell, read:

> Juror Number 70 is a good juror. I really think we need to fight for her. We must because she a good, honest person whom I've known for a while now.

(Id. at S16).

The trial court received several notes from jurors during deliberations. (CP vol. 14 at 1782-88.) One juror wrote:

> A juror, Mr. Bibb, announced during deliberations that he was present at a lawnmower shop behind Tardy Furniture all day on the day of the murders and has told us that he knows there was no investigation, questioning, or canvassing of the area and that all evidence in the store was planted because he personally observed the activity at the store that day.
>
> I could not in good faith withhold this information from the Court.
>
> Please advise me on how to continue.
>
> ....

(Id. at 1784.) Another juror stated that:

> It has come to the attention of the Jury that a member of the jury has knowledge of the investigation that was not presented in court. It has impeded the rest of the jurors in reaching a decision. We request guidance in further action.

(Id. at 1781, 1787). Ultimately, the jury foreman notified the trial court that the jury could not agree on a verdict. (Id. at 1797). The trial court declared a mistrial and dismissed the jurors, except for Juror James Bibbs. (CP vol. 15 at 1912). Mr. Bibbs was instructed to remain seated. After the other jurors had left the courtroom, the trial court called Mr. Bibbs to the bench and asked:

> [THE COURT:] Do you remember last week that the jury was questioned under oath and there were a number of questions about this case that I -- I mean I questioned the jury at length for almost two days. I don't think I've ever asked any more questions of a jury panel that I asked this one.
>
> And I remember asking a specific question, and that is, of all the panel, have you heard anything about the case. Do you remember heard anything about the case. Do you remember that question being asked
>
> [MR.] BIBBS: Yes, I remember.

THE COURT: And your answer to the Court was that you had heard about the case in the media.

And then I asked you – I knew you had a relative in law enforcement. And I – and I asked you if you had heard anything about the case from your relative. And you indicated that you had not.

Well, I receive[d] a note from the jury less than an hour into deliberation yesterday advising that there was a particular juror who was trying to bring out information during deliberations that had not been presented here in open court.

And then I got another note right about lunch today from a juror who specifically stated that you were at a lawn mower repair shop the same day as these murders, that you were real close to the shop. And that you knew the police officers were not doing what they said because you were in the neighborhood. That juror further stated to me that you stated that you knew the police didn't – that, that some of the evidence in Tardy Furniture store was planted. And so I want to know if that occurred. Did you –

[MR.] BIBBS: Only –

THE COURT: – tell the jury those things?

[MR.] BIBBS: Only thing I told the jury was that I was in the alley at the time and didn't anyone come around there. That is the only thing I said

THE COURT: And you didn't – you didn't – you didn't mention anything about the evidence inside the store or that the law –

[MR.] BIBBS: No.

THE COURT: – officers –

[MR.] BIBBS: No.

THE COURT: – didn't go around –

[MR.] BIBBS: No.

THE COURT: – investigating.

[MR.] BIBBS: No. I, I didn't say – I said we were standing around at the repair shop. At the – at the time I was there, didn't anyone

come around there. That is the only thing I said.

THE COURT: Well, is there any reason why when we were questioning you last week under oath that you didn't bother to mention to the Court that you had knowledge of this case?

[MR.] BIBBS: Well, not – I mean I, I misunderstood you.

THE COURT: No, sir. You did not misunderstand. I could have the court reporter right now read what was said by you so don't stand there and lie to me. Now, is there any reason why you felt compelled to perjure yourself before this Court last week?

[MR.] BIBBS: I wasn't intending to do that, Judge.

THE COURT: Well, I am going to let the grand jury of this county decide whether you committed perjury because in my eyes –

(MR. CARTER STARTED WALKING OUT OF THE COURTROOM.)

THE COURT: – you have committed perjury. And Mr. Carter, if you – you have a seat, Mr. Carter. You have not been –

(MR. CARTER RETURNED TO COUNSEL TABLE AND WAS SEATED.)

....

Mr. Bibbs, I am going to bind you over to await the action of the grand jury. There will be, I'm sure, several members of this panel that were on this jury that will be testifying next week in front of the grand jury. But I do find probably cause at this time to believe that you have committed the crime of perjury.

I am going to order you bound over to await the action of the grand jury. I am going to have you jailed right now, and I am going to set bond at $20,000.

I'm not – I mean this is absolutely ridiculous that I have jurors come into this court and lie to this Court in order to get on a jury. And that is exactly what you have done, Mr. Bibbs.

(Id. at 1912-16).

Flowers VI

On April 20, 2010, a special venire comprised of 600 prospective jurors was drawn. (Trial Tr. vol. 26 at 348). A juror questionnaire was mailed to each prospective juror. (CP vol. 15 at 2014-

17). Based on the returned questionnaires, the venire initially "consisted of forty-two percent African-Americans and fifty-five percent whites." *Flowers VI(B)*, 240 So.3d at 1122 (¶ 104).

Jury selection in *Flowers VI* commenced on June 4, 2010. (Trial Tr. vol. 27 at 477). Voir dire began on June 10, 2010. At that time, the venire was comprised of eighty-nine whites and sixty-seven African Americans. (CP vol. 22 at 3002). After voir dire and challenges for cause, forty-nine prospective African-American jurors had been excused for their kinship or friendship with Petitioner and members of his family, or their views on the death penalty. (Id. at 3002-04). Following voir dire, Petitioner moved to preclude the prosecution from using peremptory strikes against prospective African-American jurors (Trial Tr. vol. 35 at 1733-36). He also moved to have the trial court perform a "complete and random reshuffle of the remaining names." (Id. at 1747). He also moved to quash the venire and requested a mistrial because there was an insufficient number of African-Americans. (Id. at 1749, 1750-52; CP vol. 22 at 3002). Those motions were denied and the peremptory strike phase began. The State accepted Alexander Robinson, a prospective African-American juror, then exercised six peremptory strikes—five were against prospective African-American jurors. (CP vol. 22 at 3022). Petitioner lodged a *Batson* objection after the State exercised its fourth strike against a prospective African American juror, and reminded "the Court's going to have to consider the totality of the circumstances...." (Trial Tr. vol. 35 at 1758-59).

During the *Batson* hearing, the State provided the following race-neutral reasons for its peremptory strikes. Juror 14, Carolyn Wright, was sued by Tardy Furniture after the murders.[3]

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[3] During the *Batson* hearing, the prosecution introduced an abstract of a municipal court judgment obtained by Tardy Furniture against Carolyn Wright into evidence as State's Exhibit 1 to the *Batson* hearing. (Trial Tr. vol. 35 at 1771). Petitioner argued the prosecution's investigation and efforts to obtain the abstract was evidence of pretext, as there did not appear to be investigations into prospective white jurors. (Id. at 1771-72). The prosecution responded by stating that it "checked every prospective juror on the list to see

Wright also worked with Petitioner's father, Archie. (Trial Tr. vol. 35 at 1763; CP vol. 22 at 3022). Juror 44, Tashia Cunningham, stated in her jury questionnaire that "she would not consider death or life." Cunningham was then "back and forth in questioning on what her opinion was on the death penalty," so much so that the State "could not keep her." (Id. at 1775-76; CP vol. 22 at 3022). Cunningham also worked with Petitioner's sister, Sherita Baskin, on an assembly line. Cunningham stated that she "worked on the complete opposite end of the line" from Baskin, however, Cunningham's HR representative testified during voir dire that Cunningham and Baskin worked "right next to" each other "practically every day." (Id.; CP vol. 22 at 3022).

Juror 45, Edith Burnside, stated that Petitioner was "very good friends with both of her sons." Ms. Burnside also was sued by Tardy Furniture. Finally, Ms. Burnside "at one point said she could not judge." Ms. Burnside stated the "fact that she knew [Petitioner] so well, he had visited in her home, and was such close friends with her sons might affect her decision in this case." (Id. at 1783-84; CP vol. 22 at 3022). Juror 53, Flancie Jones, was related to Petitioner. "She admitted that she was related-she was cousin-or [Petitioner]'s sister, Angela Jones, is her niece." (Id. at 1786; CP vol. 22 at 3022). Jones was approximately thirty minutes late for court on two separate occasions. (Id.; CP vol. 22 at 3022). She was "back and forth all over the place on her opinion about the death penalty." She stated during voir dire that she was in favor of the death penalty; on her jury questionnaire she stated she was strongly against the death penalty. When asked about that inconsistency, Jones admitted that she lied on the questionnaire. (Id. at 1786-87; CP vol. 22 at

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if they had ever had nay run-ins or were sued by Tardy Furniture after these murders...." (Id. at 1772). The trial court corrected Petitioner by noting that "the entire panel was asked first if they had ever had a charge account with Tardy Furniture. And then they were asked if they had every been sued by Tardy Furniture. It was not just asked of African-American jurors, as you claimed." (Id. at 1773).

3022). Finally, Juror 62, Diane Copper, worked with Petitioner's father. She also worked with Petitioner's sister at a shoe store. And, Copper stated "that she leaned toward favoring [Petitioner's] side of the case." (Trial Tr. vol. 36 at 1794; CP vol. 22 at 3022).

Petitioner attempted to rebut some of the prosecution's race-neutral reasons. (CP vol. 22 at 3023). With respect his attempts, the trial court expressly found as follows:

> [T]he defense tried to rebut the strikes of jurors 14 and 44 by arguing that the prosecution tendered juror 17, even though she knew Archie Flowers and other members of the Flowers family. However, this court found that a bank teller, who waits on customers at a bank, is substantially different from working at the same business establishment with members of the defendant's family. It was also abundantly clear that juror 17 had a much closer relationship with members of the victims families tha[n] she had with anyone in [Petitioner's] family. In fact, this was of such a concern to [Petitioner] that he sought to have this court strike juror 17 from the venire for cause. This court will also note that the prosecution did not strike juror 8, an African-American male, even though he knew Archie Flowers, Jr. from the Auto Zone store. It was evident to this court that the prosecution utilized peremptory strikes only against those individuals who actually worked with, or who in the past had worked with, members of [Petitioner's] family.
>
> The defense also tried to rebut the strike of juror 53, by arguing that the State tendered juror 51, even though he had not originally been forthcoming about the fact that he had heard about the case from being in a previous venire. However, this court found that [Petitioner] failed to rebut the strike of juror 53, because juror 53 intentionally lied on her questionnaire, while there was nothing to indicate that juror 51 had intentionally been untruthful. Ultimately, this court found the State offered race neutral reasons for all of the peremptory strikes utilized by the prosecution and that the defense failed to rebut those reasons.

(Id.). A jury, comprised of eleven whites and one African-American juror, was empaneled. Three alternate jurors were seated. Two were white; one was African-American. (Id. at 3004; Trial Tr. vol. 36 at 1801-05). On June 18, 2010, that jury found Petitioner guilty on all four counts of capital murder. (Trial Tr. vol. 45 at 3245-46). The next day, the jury returned a verdict recommending a sentence of death for each conviction. (Trial Tr. vol. 47 at 3480-84).

Petitioner directly appealed the judgements of his convictions and sentences with eighteen

claims of error. The Mississippi Supreme Court, finding no error, affirmed Petitioner's convictions and sentences on November 13, 2014. After his motion for rehearing was denied, Petitioner petitioned this Court for review of the following two questions:

> I. Whether compelling a defendant to stand trial six times on the same charges, where three judgments were reversed due to prosecutorial misconduct and two other trials ended with hung juries, violates the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment?
>
> II. Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?[4]

On May 23, 2016, this Court held the decision of a Georgia habeas court and the Georgia Supreme Court, that Timothy Tyrone Foster failed to show purposeful discrimination for two peremptory strikes, was clearly erroneous. *Foster v. Chatman*, 578 U.S. ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016). This Court's review of the state court record and evidence admitted during Foster's state habeas proceedings revealed: (1) disparate treatment of prospective African-American jurors, (2) shifting reasons for strikes, (3) misrepresentations of the record, and (4) a "persistent focus on race" in the prosecution's case file. *Foster*, 136 S.Ct. at 1754. Because the decision was clearly erroneous, the Court reversed and remanded Foster's case for further proceedings. *Id.* at 1755.

Then on June 20, 2016, the Court issued GVRs in three pending cases. The Court granted three pending writ applications, vacated the judgments of three state supreme courts—including the Mississippi Supreme Court's in *Flowers VI(A)*—and remanded for reconsideration in light of *Foster*. *Jabari Williams v. Louisiana*, 136 S.Ct. 2156 (Mem) (2016), *Christopher Anthony Floyd v. Alabama*, 136 S.Ct. 2484 (Mem) (2016), and *Curtis Giovanni Flowers v. Mississippi*, 578 U.S. ——,

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[4] Petition for a Writ of Certiorari to the Mississippi Supreme Court, *Curtis Giovanni Flowers v. Mississippi*, 136 S.Ct. 2157 (U.S. Jun. 29, 2015) (No. 14-10486).

136 S.Ct. 2157 (Mem) (2016). On November 2, 2017, the Mississippi Supreme Court published its decision on remand from this Court. The court reconsidered Petitioner's *Batson* claim in light of *Foster*, found no *Batson* violation, reinstated Petitioner's convictions and sentences, and affirmed the judgment of the trial court. *Flowers VI(B)*, 240 So.3d 1082.

REASONS FOR DENYING THE WRIT

Petitioner raises one issue for consideration, and claims it warrants discretionary review. It does not. The writ should not issue because judgment below is consistent with the precedent of this Court. Further, the Mississippi Supreme Court correctly decided his *Batson* claim. For the reasons discussed below, the Court should deny the petition.

I. The judgment below is consistent with this Court's precedent.

The question presented in this case is a request for fact-specific error correction concerning the application of properly stated and well-settled principles of law. Petitioner contends that the Mississippi Supreme Court ignored the exceptional circumstances in this case, and limited its review by deferring to the trial court without considering the possibility that its decision was clearly erroneous. He argues that, to comply with the GVR, the Mississippi Supreme Court was required to reconsider his *Batson* claim without deferring to the trial court's factual findings. (Pet. for Cert. at 15-18). He is mistaken. Petitioner is attempting to manufacture a conflict by claiming the Mississippi Supreme Court bucked its obligation to reconsider his *Batson* claim in light of *Foster*, and maintained "an adherence to an ahistorical approach" of ignoring evidence of past discrimination in assessing the reasons given for exercising five peremptory strikes against prospective African-American jurors. (Id. at 15).

A. *Foster* did not alter the deference given to trial courts.

Petitioner contends that, to comply with the GVR, the Mississippi Supreme Court was required to reconsider his *Batson* claim without deferring to the trial court's factual findings. And he argues that the Mississippi Supreme Court ignored the exceptional circumstances in this case, and limited its review by deferring to the trial court without considering the possibility that its decision was clearly erroneous. (Pet. for Cert. at 15-18). He is mistaken.

While the Court's GVR mandated the Mississippi Supreme Court reconsider Petitioner's case in light of *Foster*, *Foster* did not change the applicable principles for analyzing a *Batson* claim. *Flowers*, 136 S.Ct. at 2158 (ALITO, J., dissenting). In fact, the Court reiterated the teachings of *Batson v. Kentucky*, 476 U.S. 79 (1986), and the three-part process for determining whether a strike is discriminatory. *Foster*, 136 S.Ct. at 1747 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 476-78 (2008)). The Court's analysis in *Foster* was confined to *Batson's* third step and focused on case-specific evidence, which supported the conclusion that Foster had carried his burden of persuasion by demonstrating the prosecution purposefully discriminated during jury selection.

In that case, Timothy Foster confessed to killing a 79-year-old widow in 1986. *Foster*, 136 S.Ct. at 1743. His trial began the following year. *Id.* Jury selection took place in two phases: removal-for-cause then peremptory strikes. *Id.* Of the forty-two prospective jurors who remained when the peremptory strikes phase began, four were African-American. *Id.* The prosecution had ten strikes; Foster had twenty. *Id.* The prosecution used nine strikes, and removed the four African-American jurors. *Id.* So Foster objected, claiming the strikes against the African-Americans violated *Batson v. Kentucky*. *Id.* His objection was overruled. *Id.* Foster was tried, convicted, and sentenced to death. *Id.*

After trial and appeal, Foster sought state habeas relief. He obtained the DA's case file during these proceedings, and developed a considerable record of purposeful discrimination by introducing documents from the DA's case file into evidence during an evidentiary hearing. *Id.* Despite this evidence, both the state habeas court and the Georgia Supreme Court denied Foster relief. *Id.* at 1742-43, 1745. This Court granted certiorari, considered Foster's *Batson* claim, and reversed. *Id.* at 1754-55.

The Court's decision to reverse was based on the evidence presented during the state habeas evidentiary hearing, which showed Foster had carried his burden of persuasion by demonstrating purposeful discrimination during jury selection. That evidence included: (1) four copies of the jury venire list with the names of the prospective African-American jurors highlighted in green, and a legend that indicated the names highlighted green, "represents Blacks"; (2) an affidavit drafted by an investigator with the DA's Office, which compared the prospective African-American jurors and stated "[this one] might be okay"; (3) handwritten notes related to prospective African-American jurors with references B#1 for Eddie Hood, B#2 for Louise Wilson, and B#3 for Corrie Hinds; (4) a list of jurors who survived removal-for-cause with the letter "N" appearing next to the prosecution's strikes; (5) a list of six names, titled "definite NO's," which included the names of all qualified African-American jurors; (6) a handwritten document, titled "Church of Christ"; and (7) the returned jury questionnaires with the race response circled. *Id.* at 1744. "In sum, the Court's decision in *Foster* relied on substantial, case-specific evidence in reaching its conclusion that the prosecution's proffered explanations for striking black prospective jurors could not be credited." *Id.* at 2159. *Foster* involves evidence that was developed after trial, and offered to show the prosecution's reasons for striking prospective African-American jurors at trial could not be credited.

In reconsidering Petitioner's *Batson* claim, the Mississippi Supreme Court noted that "*Foster* hinged on several apparent misrepresentations made by the prosecution" at trial, rather than a "prosecutor's history of adjudicated *Batson* violations." *Flowers VI(B)*, 240 So.3d at 1118 (¶ 87). Even so, the court looked to *Foster* for guidance in considering "other issues that might place our original opinion in *Flowers [VI]* in error." *Id.* In doing so, the court correctly stated the fact that *Foster* concerns *Batson's* third step, which "'turns on factual determinations, and, "in the absence of exceptional circumstances," we defer to state court factual findings unless we conclude that they are clearly erroneous.'" *Id.* at 1119 (¶ 91) (quoting *Foster*, 136 U.S. at 1747 (quoting *Synder v. Louisiana*, 552 U.S. 472, 477 (2008))).

The Mississippi Supreme Court then addressed Petitioner's argument, that it failed to follow *Foster's* "totality-of-the-circumstances-approach," by omitting the prosecutor's "well-documented history from its assessment of the credibility of his facially neutral reasons." *Id.* at 1120 (¶ 98). In doing so, the court noted that "'[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'" *Id.* at 1122 (¶ 103) (quoting *Foster*, 136 U.S. at 1748). It also noted that "'determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available." *Id.* (quoting *Foster*, 136 U.S. at 1737, 1748). The court then expressly quoted several passages from the record on appeal, which showed that Petitioner made certain the trial court considered the prosecutor's history. *Id.* at 1122-24 (¶¶ 106-08).[5]

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[5] The first quoted passage appears at Trial Tr. vol. 35 at 1734-35; the second quoted passage appears at Trial Tr. vol. 35 at 1739; the third passage appears at Trial Tr. vol. 35 at 1764-65; the fifth quoted passage appears at Trial Tr. vol. 35 at 1766-67; and the sixth and final quoted passage appears at Trial Tr.

Petitioner argues the passages quoted in *Flowers VI(B)* do not support the finding that the trial court considered the district attorney's history. He claims "there is absolutely no evidence in the record supporting that assertion." (Pet. for Cert. at 17). He then states that the Mississippi Supreme Court "offers no language at all suggesting the trial court either shared counsel's view or acted on it." (Pet. for Cert. at 17). But the majority opinion in *Flowers VI(B)* clearly states that "the trial court was presented with and rejected [Petitioner]'s present argument ...[,]" and "the trial court certainly considered circumstances surrounding the previous trial as evidenced by its response to [Petitioner]'s *Batson* claim[.]" *Flowers VI(B)*, 136 S.Ct. at 1123 (¶¶ 107, 108). Petitioner also states that the trial court's responses to his arguments of past discrimination in no way reflect "any 'consideration' of that history." (Pet. for Cert. at 17). Respondent submits the record on appeal, as evidenced by the majority opinion in *Flowers VI*, is replete with instances where the trial court heard, considered, and rejected Petitioner's argument that the prosecutor's history must be considered under the totality of the circumstances.

Briefly, Respondent would note that Petitioner is incorrect in asserting that "for while the state court majority touts [the trial judge's response] as a reaction to counsel's argument, the trial court's statement was actually made *before* the argument was." (Pet. for Cert. at 18). He cites the trial court's response on page 1738-39 of the Trial Transcript and two instances where counsel repeated the following argument. (Id.). Beginning on page 1734, counsel argued that:

> We had in the last trial urged that should this jury – that the prosecutor be, be precluded from making peremptory strikes because so much of this – *because there is the history that has been found by the Mississippi Supreme Court of racial discrimination in jury selection with respect to this case by this prosecution. It's happened – the predecessor in Flowers II, in Harrison County, found a Batson*

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vol. 35 at 1787-89. *Flowers*, 240 So.3d at 122-24 (¶¶ 106-08).

violation and ruled a strike by the State. So that in two proceedings and on the basis of what has been a persistent patter of simply, you know, asking things that are clearly, if not flatly race or at least race-based...."

(Trial Tr. vol. 35 at 1734-35) (emphasis added). Counsel made this argument *before* the trial court responded, as it appears in the majority opinion in this case. *Flowers VI(B)*, 240 So.3d at 1122 (¶ 106). And as Petitioner points out, counsel repeatedly made this argument throughout jury selection.

The Mississippi Supreme Court did reconsider Petitioner's *Batson* claim in light of *Foster*. *Foster* concerned evidence that demonstrated the prosecution's reasons for striking prospective African-American jurors "'ha[d] no grounding in fact,' were 'contradicted by the record,' and simply 'cannot be credited....'" *Flowers*, 136 S.Ct. at 2158 (Alito, J., dissenting) (quoting *Foster*, 136 S.Ct. at 1749, 1750, 1751). The Mississippi Supreme Court reviewed the record on appeal and failed to find exceptional circumstances that showed the trial court's factual findings were clearly erroneous. In other words, the court verified the trial court's findings. Before addressing Petitioner's *Batson* claim, the court stated: "We do not ignore the historical evidence of racial discrimination in the previous trials in our consideration of [Petitioner]'s arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1124 (¶ 111). Respondent submits the Mississippi Supreme Court correctly stated and properly applied the well-settled principles of this Court's *Batson* jurisprudence in deferring to the trial court's factual findings.

Petitioner asks the Court to assume the prosecutor violated *Batson* in this case because the prosecutor was found by four justices of the Mississippi Supreme Court to have violated *Batson* in *Flowers III*. This is inconsistent with this Court's *Batson* jurisprudence. *See Johnson v. California*, 545 U.S. 162, 171 (2005) (recognizing that the ultimate "burden of persuasion rests with, and never

shifts from, the opponent of the strike"); *Batson v. Kentucky*, 476 U.S. 79, 98 (1986). He does not explain how the prosecutor's history of adjudicated *Batson* violations constitute substantial, case-specific evidence that demonstrates any of the prosecution's strikes against the prospective African-American jurors should not be credited. He makes no mention of the fact that four Mississippi Supreme Court justices, who dissented in *Flowers III*, found no *Batson* violation whatsoever. Nor does he address facts in the record, which significantly undermine, if not wholly discount his *Batson* claim. *See Foster*, 136 U.S. at 1748 (stating that "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted"); *Miller–El v. Dretke*, 545 U.S. 231, 252 (2005) (*Miller–El II*). Those facts include: (1) prospective jurors' relationships with Petitioner and members of his family in *Flowers VI* and earlier trials; (2) an alternate juror, who knew Petitioner and committed perjury in an attempt to be seated as a juror in *Flowers V*; (3) a juror who caused the mistrial in *Flowers V* by tainting the jury with information disclosed during deliberations but was not admitted into evidence or disclosed during voir dire; (4) Petitioner's motion to reshuffle the jury following challenges for cause;[6] (5) Petitioner's decision to be tried in Montgomery County after arguing in *Flowers VI* and earlier cases that he could not be fairly tried in that county; and (6) prospective jurors' relationships with defense witnesses.

B. The judgment below is consistent with *Miller-El*.

Next, Petitioner claims the judgment below is inconsistent with *Miller–El II*. (Pet. for Cert. at 18-19). He argues "*Flowers VI(B)* does acknowledge that *Miller-El* attached probative value to

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[6] Trial Tr. vol. 35 at 1747. Precedent recognizes the use of a "shuffle" may indicate an attempt to manipulate the racial composition of the venire to be questioned. *Miller–El II*, 545 U.S. at 245 (quoting *Miller El v. Cockrell*, 537 U.S. 322, 346 (2003) (*Miller-El I*)).

prior history, but then dismisses that precedent with a remarkable comparison: 'The Court does not have before it [sic] of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*.'" (Id. at 18). According to Petitioner, the district attorney's "prior history is *more* probative of discriminatory intent than was the historical evidence in *Miller-El*." (Id.). This argument is an extension of the previous argument. (Pet. for Cert. at 18).

The Court in *Miller-El II* identified five factors to be used in "ferreting out" discriminatory pretext of peremptory strikes. One of the factors identified in *Miller El-II* was a history of systematically excluding minority jurors. 545 U.S. at 263-64. The facts in *Miller-El II* illustrated this factor by way of a twenty year-old formal policy of excluding minorities that had been adopted by a district attorney's office. *Id.* at 263-64. "A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] ..." which "was distributed to prosecutors" and "available to at least one of the prosecutors in Miller-El's trial." *Id.* at 264. The fact that the Sparling manual was available to at least one of the prosecutors at trial made it evidence of pretext.

With respect to *Miller-El II*, the state supreme court stated that:

> The evidence of a specific policy of past discrimination in *Miller–El II* significantly differs from the evidence before the Court.... The Court does not have evidence before it of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller–El II*. *Miller–El II*, 545 U.S. at 266, 125 S.Ct. 2317 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror.").

Flowers VI(B), 240 So.3d at 1124 (¶ 110).

The Mississippi Supreme Court did not dismiss *Miller-El II*, as Petitioner contends. It reviewed the record and found the evidence in this case significantly differed from the evidence in *Miller-El II*. The court also failed to find evidence that demonstrated the prosecutor's past

adjudications tended to show that, in this case, the five prospective African-American jurors peremptorily struck on the basis of race. In addressing his *Batson* claim, the Mississippi Supreme Court clearly stated: "We do not ignore the historical evidence of racial discrimination in the previous trials in our consideration of [Petitioner]'s arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1124 (¶ 111).

C. The circumstantial evidence in this case

Petitioner attempts to calls the majority's finding, that the prosecutor's adjudications in other cases do not undermine the race neutral reasons in this case, into question. He argues the majority could have, but chose not to comply with the Court's GVR or make an effort to discern guidance from *Foster* in reconsidering his *Batson* claim. (Pet. for Cert. at 19). According to Petitioner, the majority's decision in *Flowers VI(B)* is nothing more than an attempt to save face and avoid embarrassment. (Id.). Respondent sees things differently.

First, the majority made the observation that *Foster* did not involve a particular prosecutor's history of adjudicated *Batson* violations for a reason. *Foster* is based on factual determinations of evidence that demonstrated the reasons given for four strikes were baseless, inconsistent with the facts in the record, and could not be credited. *Foster*, 136 U.S. at 1747. *Foster*, like *Miller-El II*, is a collateral review case, which permits evidence outside the record on appeal to be considered, unlike this case. "*Foster* hinged on several apparent misrepresentations made by the prosecution, evidenced by the record in conjunction with the prosecution's troubling jury selection file, which had a shocking focus on race." *Flowers VI(B)*, 240 So.3d at 1118 (¶ 87).

Even so, the Mississippi Supreme Court looked to *Foster* for guidance in considering "other

issues that might place our original opinion in *Flowers [VI]* in error." *Id.* Petitioner argues the majority's conclusion, that the prosecutor's adjudications do not undermine the race-neutral reasons, is illogical. If Petitioner were correct, arguably the prosecutor's adjudications would disqualify from participating in jury selection. Petitioner also suggests that the prosecutor's adjudications in this case are more "despicable" than *Foster's*, even though there is no evidence in *Flowers II* or *Flowers III* that is remotely similar to the evidence developed in *Foster* or *Miller-El II*. Considering all circumstances that may have a bearing on the issue of racial animosity into account, it cannot be said that the prosecutor's prior adjudications—in other cases—*prove* he has purposefully discriminated in this case. They may raise suspicions, but do not show purposeful discrimination similar to that in *Foster* or *Miller-El II*. This is the approach the majority took in reconsidering Petitioner's *Batson* claim, and rightfully so.

II. The Mississippi Supreme Court correctly decided Petitioner's *Batson* Claim.

Petitioner claims the Mississippi Supreme Court's consideration of his *Batson* claim was outcome determinative due its dismissal of the prosecutor's history. He contends that, when the evidence in this case is viewed cumulatively and in light of the prosecutor's history, discriminatory pretext of the five peremptory strikes is obvious. In support, he adopts the evaluation in Justice King's dissenting opinion and discusses the evidence in this case, which he believes establishes three of the five factors identified in *Miller-El II*. (Pet. for Cert. at 20-28).

It is worth noting that Petitioner's assertion, that the Mississippi Supreme Court dismissed the prosecutor's history in evaluating his *Batson* claim, is inconsistent with the plain language of majority opinion in *Flowers VI(B)*. After quoting various portions of the record on appeal in this case and concluding the prior adjudications did not undermine the race-neutral reasons given in this

case, the Mississippi Supreme Court clearly stated: "We do not ignore the historical evidence of racial discrimination in the previous trials in our consideration of [Petitioner]'s arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1122-24 (¶¶ 106-111).

First, Petitioner attempts to show the majority opinion in *Flowers VI(A)* and *Flowers VI(B)* failed to consider all relevant circumstances in this case. In doing so, Petitioner cites three of five, non-exhaust factors this Court identified in *Miller-El II*. 545 U.S. at 240-66. He begins with a discussion of his *prima facie* case.

A. *Prima Facie* Case

The first factor this Court considered in *Miller-El II*, was the total number of strikes used against a minority group and the effect on the venire. *Id.* at 241 (quoting Miller-El I, 537 U.S. at 342). The venire in *Miller-El II*, consisted of 108 jurors; twenty were African-Americans. *Id.* at 240. Nine of the twenty were removed for cause, which left eleven prospective African-American jurors prior to the peremptory strikes phase. *Id.* at 240-41. The prosecution struck ten of the eleven, excluding 91% of the qualified prospective African-American jurors. *Id.* The Court found the statistical data suggested disparate treatment. "'The prosecutors used their peremptory strikes to exclude 91% of the eligible African–American venire members.... Happenstance is unlikely to produce this disparity.'" *Id.* (quoting *Miller-El I*, 537 U.S. at 342).

In contrast, the prosecution's use of peremptories in this case was significantly and statistically lower than *Miller-El II*. When voir dire began on June 7, 2010, the venire was comprised of 67 African-Americans and 89 whites—42% African-American and 55% white. (CP vol. 22 at 3002); *Flowers VI(B)*, 240 So.3d at 1122 (¶ 104). On June 10, 2010, after conducting

group and individual voir dire and excusing members for cause, 19 prospective African-American jurors remained at the beginning of the peremptory strike phase. (Id. at 3002-04); *Flowers VI(B)*, 240 So.3d at 1122 (¶ 104). The State exercised 5 strikes against prospective African-American jurors at an exclusion rate of approximately 26%—a significantly and statistically lower rate that *Miller-El II's* 91% rate and *Foster's* 100% rate.

Justice King, in his dissenting opinion, takes issue with the dramatic shift in the composition of the venire. He asserts, "These numbers, however, reveal a clear pattern of disparate treatment between white and African–American venire members." *Flowers VI(B)*, 240 So.3d at 1161 (¶ 228) (KING, J., dissenting). But unlike the majority opinion, Justice King's dissent makes absolutely no reference to the record on appeal. The record contains multiple instances, some of which are quoted in the majority opinion, that show the prosecution had nothing to do with this shift in the venire's composition. The most detailed and in-depth discussion on this point appears in the trial court's Opinion, denying Petitioner's Motion for JNOV, or in the Alternative for a New Trial. In that Opinion, the trial court discusses the venire's composition and the reasons for this shift in considerable detail. (CP vol. 22 at 3002-06). The trial court ultimately concludes: "It is clear from the record that most of the African Americans that were excused for cause, were excused because they were either related to [Petitioner] or were friends with him of with various members of his family." (Id. at 3005; Trial Tr. vol. 35 at 1739; 1787-89); *Flowers VI(B)*, 240 So.3d at 1122-24 (¶¶ 106-09).[7]

Respondent submits the dramatic shift in the venire had nothing to do with the prosecution

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[7] The cited portions of the Trial Transcript are two instances where the trial court addresses this very argument. Both are quoted in the majority opinion in *Flowers VI(B)*.

as evidenced by the facts contained in the record on appeal. Further, Respondent submits the statistical data, concerning the prosecution's use of peremptory strikes, is significantly and statistically lower than *Miller-El II* and *Foster*. This data in no way supports an inference of pretext.

B. Disparate questioning

Petitioner and the dissent in *Flowers VI(B)* also take issue with the number of questions asked of African-Americans compared with the number of questions the prosecution asked of white jurors. (Pet. for Cert. at 22-25). He cites a portion of Justice King's dissent as the approach the majority should have taken in evaluating his *Batson* claim. (Id.). Looking there, Justice King's dissent notes that, during individual voir dire, the prosecution repeated questions the trial court had asked. *Flowers VI(B)*, 240 So.3d at 1161 (¶ 230). His assertion is not entirely true. During individual voir dire, the trial court corrected both parties. Specifically, it stated that:

> Well, both of you are continuing to repeat the very same questions that I've asked, and then you repeat them several different times. And there is no point in the length of time either side is taking. Out of – so far we have gotten one, two, three, four, five, six, seven. And nobody has changed – after I asked them questions, nobody so far as changed from what I originally asked.... I'm not singling out one side over the other. I am saying this to both sides.
>
> ....
>
> I want to make clear again, I am going to start cutting off in mid-sentence if counsel for either side continues to ask the same questions that I have asked. There does not have to be 10 or 20 questions following up what the Court has just asked if you are repeating the same questions over again. And you do not need to ask the question but one time, if you ask it at all.

(Trial Tr. vol. 31 at 1160-61; 1188).

In addition, Petitioner argues the majority opinion's view of disparate questioning was clearly erroneous and unduly deferential in the prosecution's favor. Both he and Justice King claim "that all African-Americans who were struck by the State were asked more than ten questions." But as the majority opinion points out, this is not supported by the record. *Flowers VI(B)*, 240 So.3d at

1125 (¶ 112). "For example, the State asked Carolyn Wright, an African American against whom the State exercised a peremptory strike, only three questions." *Id.* The record reflects that more questions were asked of prospective African-American jurors but only when where a potential juror's answers to voir dire questions were unclear or needed further elaboration. *Id.* Respondent submits both are neutral and necessary reasons, which are supported by the record. *Miller-El-II*, 545 U.S. at 255. "The State's assertion that elaboration and followup questions were needed with more of the African-American jurors is supported by the record." *Flowers VI(B)*, 240 So.3d at 1125 (¶ 114).

Petitioner concedes this point by acknowledging the prosecution asked more questions because "*more* African-American jurors knew the parties, *most* of the follow-up questions pertained to relevant matters, *more* questions were asked of jurors who had personal relationships about the case, or qualms about the death penalty...." (Pet. for Cert. at 23). Nevertheless, he asserts the Mississippi Supreme Court, in disregarding the prosecutor's history, allowed the prosecution to ask "highly leading questions, plainly trolling for an excuse for a strike." (Id. at 25). He cites an exchange between the prosecutor and Diane Copper, a prospective African-American juror who stated she worked with one of Petitioner's sisters. (Pet. for Cert. at 25, n. 15). What he fails to mention is that Ms. Copper also worked with Petitioner's father. She knew Petitioner's mother. She also lived near the Flowers at one point. And while Ms. Copper stated she could be fair, she also stated that these factors could have an impact on her ability to objective consider the evidence. (Trial Tr. vol. 29 at 770-71; Trial Tr. vol. 30 at 926, 934, 970-74).

Petitioner also states that the prosecutor attempted to lead Ms. "Copper into admitting that her relationships with defense witnesses ..." would affect her judgment. (Pet. for Cert. at 25). The defense witnesses included Petitioner's mother, Lola Flowers, who Ms. Copper knew. When asked,

she that she would lean towards voting in favor of Petitioner's family. Ms. Copper also stated that "it's possible" the fact that she knew many of Petitioner's family members could affect her and make her "lean toward [Petitioner]." (Trial Tr. vol. 33 at 1404-06). The prosecution asked if those relationships would, "make it to where you couldn't come in here and, just with an open mind, decide the case, wouldn't it?" Ms. Copper answered, "Correct." (Id. at 1407).

Petitioner that states that prospective jurors Pamela Chesteen and Bobby Lester, had working relationships similar to Ms. Copper's relationship with Petitioner's sister. (Pet. for Cert. at 25, n. 15). At trial defense counsel attempted to argue disparate treatment based on the fact that the State accepted "almost every white juror who had some sort of connection to this case." However, defense counsel conceded that none of the white jurors struck worked with a member of Petitioner's family-as Copper did. The trial court, accordingly, rejected Petitioner's claim of disparate treatment:

> Also, she had stated that she worked with Archie at Wal-Mart, and she worked with Cora at Shoe World. She's had close working relationship with those two individuals in Mr. Flowers's family. I see that greatly different than No. 17, Ms. Chesteen, who was the bank teller and has people that's come into the bank. There's no indication that Ms. Chesteen has ever worked with Archie Flowers, ever worked with Cora or anybody else. And so there is a huge difference between the-S-6 with Ms. Copper and any white juror that was left on the panel."

(Trial Tr. vol. 36 at 1796-97).

It is also worth noting that Ms. Chesteen and Mr. Lester had relationships with or knew of John Johnson, former Winona chief of police and investigator for the district attorney's office. (Trial Tr. vol. 30 at 915; Trial Tr. vol. 31 at 1046-47). During jury selection, Petitioner informed the prosecution that he had subpoenaed Mr. Johnson with the intent of calling him as an adverse witness while attempting to rebut the prosecution's race-neutral reasons for using a peremptory strike against Carolyn Wright. (Trial Tr. vol. 1764, 1769-70). Petitioner argued, "No probing inquiry was made

by the State with respect to any of these [personal acquaintances and interrelationships with individuals who are witnesses in this case]. And we think it is, therefore, pretextual specific and particularly in light under -- of the history of race discrimination in jury selection in this district and in this particular case...." (Id. at 1764).

Additionally, the trial court addressed Petitioner's contentions with the prosecutor's questioning during voir dire in denying two of his motions, both of which were based "largely on the basis of the documented history" of "three trials of racial discrimination...." (Trial Tr. vol. 31 at 1096). In denying Petitioner's motions, the trial court stated:

> I am overruling on the idea of prosecutorial misconduct that would preclude them from seeking the death penalty, because there has been no showing that there was any prosecutorial misconduct. And again, the reason why they didn't seek the '07 death penalty then was because of an agreement between your office and them that if you didn't seek to have this expert on identification, they would not seek the death penalty. That was clear from the record back then. Also, I do not agree with your characterization that the State has made discriminatory questions today about -- during the jury selection. The State asked everybody what was on the panel if they had ever been sued by Tardy Furniture company. That did not single out a person that was black, a person that was white. They first asked if there was people that had charge accounts there. There were a number of white people and black that said they did. And then they asked if anybody had ever been sued. You know, I think it was two or three black jurors that said they had been. But that was not anything that was suggestively racist or racial in any way. So I do not see that their questioning today has had anything dealing with race. This case is not about black and white. It is right or wrong and guilt or innocence is what this case is about. And as I say, up to this point, I have not seen any issue that would indicate that there is anything discriminatory about any question that they have asked.
>
> Also, the case law at this point in this state is clear that, you know, you can exclude people under Witherspoon if they say they cannot consider under any circumstance the death penalty. If it disproportionally results in one group of people being excluded because of that, that is the law. And I'm sworn to uphold the laws of the State of Mississippi, and I do my dead level best to follow the precedents that have been set by the Supreme Court of Mississippi and the Supreme Court of the United States. And based on that, I do not see any merit to your motion. So it is denied.

(Id. at 1101-02).

Respondent submits the prosecution did not engage in disparate questioning of prospective African-American jurors. The facts in the record on appeal show that, while the prosecution asked more questions prospective African-American jurors, it did so when answers to questions were unclear or further elaboration was needed.

C. Comparative juror analysis

Finally, Petitioner takes issue with the majority's review of the five individual African-American jurors who were struck. (Pet. for Cert. at 25-28). As before, Petitioner relies on the dissent's evaluation in an attempt to show the majority failed to consider all circumstances. (Id.). He argues the majority found no discriminatory pretext for the five peremptory strikes after reciting the race-neutral reasons given by the prosecutor and finding some evidence to support it. (Id. at 26). Respondent disagrees.

1. Carolyn Wright

Petitioner focuses on the dissent's analysis of the prosecutor's race-neutral reasons as evidence that shows the majority failed to consider circumstances beyond what was proffered. (Id.). He relies on the portion of the dissent where Justice King discusses Ms. Wright's working relationship with Petitioner's father. (Id.). Justice King suggests the possibility, that Ms. Wright had little or no working relationship with Mr. Flowers, raises questions about the prosecutor's motive. (Id.). The problem here is: there were no white jurors who had ever worked with Mr. Flowers. The trial court made this finding with respect to Petitioner's contention:

> Wal-Mart here in Winona is not like some of these giant mega stores. It's a relatively small-smallest Wal-Mart, actually, that I know in existence. So she had worked with Mr. Flowers's father. She has been sued by Tardy Furniture. I find those to be race neutral reasons. You are correct in pointing out that some of the other State-the other jurors that have been tendered by the State-some of these, you know, white jurors

know some of these people. But I have not found, looking through my notes, any white jurors that worked with Mr. Archie at Wal Mart. I have not seen any indication that Tardy sued any of those. And so I think the State has offered race-neutral reasons, and I find that the Defense has failed to rebut the reasons offered by the State.

....

If-if the only reason the State offered was that she knows some of these Defense witnesses, then there might be something there. But the fact is knowing these Defense witnesses that you're intending to call, plus the fact that Tardy had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her. And that is the finding of this Court.

(Id. at 1773-75).

Carolyn Wright worked with Flowers's father at what the trial judge characterized as the "smallest Wal-Mart in existence." In *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013), the Fifth Circuit held that a juror's familiarity with the defendant or his family is a race-neutral reason for a strike. Striking a juror who worked with the defendant or a member of his family is a race-neutral reason for a strike. *See Manning v. State*, 735 So.2d 323, 340 (Miss. 1999) ("We have condoned a peremptory challenge against a juror who was acquainted with the defendant's family").

Petitioner also claims the majority's notation that "'on her juror questionnaire, Wright wrote that she had previously served as a juror in a criminal case involving the 'Tardy Furniture trial[,]'" cannot be considered evidence that will support a race-neutral reason. (Pet. for Cert. at 26, n. 16). Respondent disagrees. Under state law, a juror's history of litigation with any of the parties or their attorneys is, therefore, a race-neutral reason for a strike. *Webster v. State*, 754 So.2d 1232, 1236 (Miss. 2000). The majority was not imagining a reason for a strike. It cited evidentiary support for a reason given by the prosecution, which is consistent with this Court's precedent. *See Rice v. Collins*, 546 U.S. 333, 341-42 (2006) (stating that the Ninth Circuit erred in reversing the trial court's determination of credibility when there was evidence, although not on the record, to support

the prosecutor's proffered reasons for the peremptory strikes).

Next, Petitioner cites the dissent where it calls attention to the white jurors' acquaintances with potential witnesses. (Pet. for Cert. at 27). As noted above, the critical distinction is the fact that Chesteen did not work with anyone in Petitioner's family, as Wright did. The trial court asked defense counsel if any white jurors tendered worked with Petitioner's father. Defense counsel responded, "no." (Id.). Petitioner argues that the majority initially discounted the fact that Chesteen knew potential witnesses only to later state this reason was a "convincing reason." He also questions the majority's failure to explain why it did not count the comparison as evidence of pretext. (Id., at 27, n. 17). It did. The majority specifically cited "*Hughes*, 90 So.3d at 626 (¶ 37) ('Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pretextual.')". *Flowers VI(B)*, 240 So.3d at 118. The majority's conclusion with respect to Ms. Wright's stated reason was that:

> Flowers's claim that the State provided "no convincing reasons" for striking Wright is simply unfounded. Wright had worked with Flowers's father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture. We also note that, on her juror questionnaire, Wright wrote that she previously had served as a juror in a criminal case involving the "Tardy Furniture trial." The State had multiple, credible, race neutral reasons for striking Wright, and the trial judge did not err in denying Flowers's *Batson* challenge as to the juror.

Flowers VI(B), 240 So.3d at 1128 (¶ 121).

Finally, Petitioner takes issue with the fact that Ms. Wright, while sued by Tardy Furniture, did not have her wages garnished. According to Petitioner and the dissent, this was a significant mischaracterization that the majority blew-off as irrelevant. (Pet. for Cert. at 27, n. 18). In Mississippi, a juror's history of litigation with any of the parties or their attorneys is a race-neutral

reason for a strike. *Webster*, 754 So.2d at 1236. The majority acknowledged the mischaracterization, stating that: "Petitioner claims the State mischaracterized Wright's litigation with Tardy Furniture by claiming that her wages had been garnished as a result of the litigation. Nothing in the record supports the contention that Wright's wages were garnished. However, that does not change the fact that being sued by Tardy Furniture was a race neutral reason for striking Wright. Prior litigation is a race neutral reason for a preemptive strike." *Flowers VI(B)*, 1127 (¶ 119).

Petitioner and Justice King find the garnishment problematic, because it "is easy to imagine that litigation which ends in friendly terms—for example, a settlement—might result in the parties having different feelings toward one another as opposed to a suit which results in garnished wages." But in this case, litigation did not end in a settlement. Ms. Wright had a judgment entered against her, which was introduced into evidence during the *Batson* hearing as State's Exhibit 1. And Ms. Wright stated that she paid her debt. (Trial Tr. vol. 30 at 965). Again, Respondent submits the majority correctly concluded that the prosecutor offered race-neutral reasons, including the fact that Ms. Wright had been sued by Tardy Furniture.

Petitioner is correct in that the majority and dissent diverge in the analyses. But the majority's analysis is supported by the facts contained in the record on appeal. Furthermore, there is nothing that suggests that majority's decision to affirm is clearly erroneous. The majority correctly deferred to the trial court. And Respondent submits there was no *Batson* violation in this case.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

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